tioner was convicted of the transfer of heroin, not in pursuance of a written order form, in violation of 26 U.S.C. 4705(a). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. 35–41).

Petitioner was indicted for the above offense together with one McAlee, who was separately tried and convicted in January 1967. Petitioner, who had been a fugitive, was later apprehended and brought to trial in July 1967, but a mistrial was declared because of the disability of a juror. The retrial was set for October 9, 1967, but was twice continued and the trial finally began on October 23.

The evidence showed that Chesley, an agent of the Federal Bureau of Narcotics, and Coy, an informant, were in an apartment in Berkeley on October 14, 1966. McAlee came to the door of the room and said "We are ready, get the money." Chesley gave Coy $450, whereupon the two men followed McAlee across the hall to the open door of a bathroom. Chesley testified that he could see McAlee and petitioner inside the bathroom. Petitioner said "There it is," indicating a powdery substance (later determined to be heroin) on a chair in the bathroom. Coy asked "Where?" and McAlee replied "Right there." Coy started to hand the money to McAlee but petitioner grabbed the money from him and counted it. Coy took the heroin and petitioner and McAlee left after petitioner told Coy he did not then wish to meet Coy's partner (Pet. 36–37).

At McAlee's trial in January 1967, Coy was a witness and corroborated agent Chesley's story. Apparently

believing that Coy would change his story, petitioner's counsel attempted to subpoena him to testify at petitioner's July trial, but Coy refused to accept the subpoena. The opinion below relates that when petitioner's counsel notified the prosecutor of this fact, by mutual agreement Coy was arrested on a warrant "and released on bail." Following the declaration of mistrial the court directed Coy to appear at the time the case was next set for trial. On October 2, 1967, Coy declared that he would present himself on October 9, the date fixed for trial. He failed to appear that day and a warrant for his arrest was issued. Successive continuances were granted to October 23, and on that day petitioner sought a further continuance to locate Coy, although no one present had any information as to Coy's whereabouts. The trial judge denied the continuance.

1. In his petition for mandamus, petitioner seeks rehearing of his appeal on the ground that the court of appeals erroneously stated in its opinion that Coy was released "on bail" pending petitioner's retrial when in fact Coy was released on his own personal recognizance. This error is insignificant and its correction would obviously not affect the court of appeal's decision.

2. In his petition for a writ of certiorari, petitioner argues that the trial court erred in denying a continuance. The court below properly held that this ruling was well within the discretion of the trial court (Pet. App. 38). Furthermore, the trial court attempted to mitigate the effect of Coy's absence by permitting

petitioner to introduce a tape recorded statement of Coy for purposes of impeaching Chesley's testimony that petitioner was in the bathroom during the illicit transaction. Petitioner's contention that the trial court committed reversible error in admitting further testimony by agent Chesley to impeach the tape recorded statement is fully discussed in the opinion below.

The opinion below also fully answers petitioner's arguments that the district court improperly admitted testimony of McAlee's statement to Coy and Chesley during the narcotics transaction that "We are ready, get the money."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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Supreme Court
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United States
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Petitioner,
vs.
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Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSTON BRYANT MCCONNEY,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF THE GRANTING OF THE PETITION FOR A WRIT OF MANDAMUS AND THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

No. 201

WINSTON BRYANT McCONNEY,
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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PETITION FOR A WRIT OF CERTIORARI

I

Respondent, by its reply memorandum, fails to grasp the unusual significance of this case and fails to

perceive the fundamental rights of criminal defendants which are now in jeopardy as a result of holdings below. In its briefest of memoranda, respondent fails to reply to or cite a single authority in opposition to those of petitioner.

In the instant case, this court has a most unique opportunity to reaffirm the basic principles of Federal criminal justice in a well defined setting, since this prosecution consisted of a single count of a violation of a United States Code wherein the prosecution systematically used hearsay testimony on which the jury must have relied and which was properly and timely objected to by defense trial counsel. The most basic fact of this case is that every item of hearsay was the out-of-court statement of the absent material defense witness, Jesse H. Coy, whose absence prompted defense counsel to twice move the trial court for a reasonable continuance in order to obtain his presence. This same Jesse H. Coy was an employee of respondent, a known and experienced informer whom the United States Attorney could have produced and was charged with the responsibility of producing for the trial.

Ever since the *Bruton* case was decided in 1968, (*Bruton* v. *United States*, 391 U. S. 123; 88 S. Ct. 1620; 20 L. Ed. 2d 476) there has been a steady erosion of the ruling of this court by the various circuits and constant attempts to narrow and diminish its force. The constitutional significance of the depriva-

tion of confrontation and of the right to cross-examine accusing witnesses is of immense national importance at this time and must be resolved. If this court fails to sieze this opportunity to lay down rules for the conduct of trials wherein conviction would be impossible without hearsay, this case can be cited in the future as supporting the proposition that hearsay informer-testimony can be the principal basis of a conviction. Such a proposition is most repugnant to recognized principles of a fair and orderly trial and to the Sixth Amendment guarantee of the right of a defendant to confront and cross-examine witnesses testifying against him. (*Bruton* v. *United States*, supra; *Barber* v. *Page*, 390 U.S. 719; 88 S. Ct. 1318; 20 L. Ed. 2d 255 [1968], *People* v. *Green*, 70 C. 2d 654; 75 Cal. Rptr. 782; 451 P. 2d 422. [1969]).

While admitting the presence of hearsay testimony, respondent urges that its prejudicial effect was eliminated by admonitions and instructions, notwithstanding the practical and legal impossibility of such an event. Neither the Court of Appeals nor respondent reply to petitioner's argument that prejudicial hearsay is not correctable, since, once heard, testimony cannot be erased from the minds and memory of the jurors. (*Bruton* v. *United States*, supra).

The court below, by affirming petitioner's conviction, is also now on record as approving the use of hearsay introduced under the co-conspirator rule, although almost devoid of the proof aliunde that is re-